enforcement of the federal act, because the state, in enforcing its own law, would be enforcing the federal act also.

The decision, however, may perhaps be supported on another ground. To justify, as a police regulation, a restriction of liberty or the taking of private property without compensation, under the Fourteenth Amendment, the purpose of the statute must be to afford some reasonably necessary protection against dangers, frauds, vice, or oppression. It would seem arguable, at least until the goods were sold, that the federal act would afford as efficient protection against fraud as this Wisconsin statute.[11] If this is so, the Wisconsin statute would seem unnecessary, and would result in deprivation of property and abridgment of freedom without due process of law and therefore would be unconstitutional.

INCIDENTS OF PROCEDURE UNDER PENAL STATUTES. — The fear of oppression at the hands of the sovereign, and the odium attaching to criminal proceedings, together with the disadvantage under which the accused labors both as to counsel and as to his prejudicial position in the court room, collectively seem to be the bases of the common law and constitutional safeguards in criminal cases.[1] These immunities in favor of the accused have therefore logically no place in a proceeding to enforce a statute under the terms of which the penalty does not inure to the state;[2] for the right to punish and to pardon is then not in the sovereign but in the individual suing for the penalty.[3] The same seems true of *qui tam* actions, where the informer is entitled to part of the fine, since the state has divested itself of the right to remit the whole penalty.[4] These privileges, on the other hand, seem equally inapplicable under a statute providing for enforcement by means of a civil action. For it was the very form of a criminal prosecution which called the safeguards into requisition. In *United States* v. *Regan*, 203 Fed. 433 (C. C. A., Second Circ.), under a statute providing for the punishment of the importation of aliens by means of a civil action for the penalty, at the suit of the United States or an informer, the court held that proof beyond a reasonable doubt was necessary. Such a ruling would seem incorrect by the above reasoning. The court reached its result apparently because the act forbidden was called a misdemeanor by the statute. Now in a civil suit it is frequently necessary for the plaintiff to prove an act which is in itself a crime, but this does not necessarily require its proof beyond

[11] The Wisconsin statute says in substance that syrup mixtures containing more than seventy-five per cent glucose, shall be labelled "Glucose flavored with Sugar-cane Syrup . . .," and "shall have no other designation or brand."

[1] See 1 WHARTON, CRIMINAL EVIDENCE, 10 ed., § 1.

[2] Town of Partridge *v.* Snyder, 78 Ill. 519; United States *v.* Laescki, 29 Fed. 699; Phillips *v.* Bevans, 23 N. J. L. 373.

[3] Where the right of action is in a municipal corporation, the principle would seem to be the same. City of Greensburgh *v.* Corwin, 58 Ind. 518. But it should be observed that the language of a particular charter may render the enforcement of a municipal ordinance a criminal proceeding. In the matter of Querrero, 69 Cal. 88.

[4] United States *v.* Griswold, 30 Fed. 762; State *v.* Williams, 1 Nott & McC. (S. C.) 26.

a reasonable doubt. True, the argument has often been advanced that the criminal character of the *factum probandum*, necessitated proof beyond a reasonable doubt, but the great weight of authority holds that where the proceedings are civil a preponderance of the evidence is enough. Thus it is generally held that only a preponderance of evidence is necessary in bastardy proceedings, in civil actions to enjoin a private nuisance, to set aside fraudulent conveyances, to recover the proceeds of money stolen by the defendant, in actions for seduction, and pleas of truth in actions for defamatory charge of crime, or of arson in actions on insurance policies.[5] Consequently the according to a defendant of common law and constitutional privileges does not depend on the nature of the *factum probandum*, but on the particular form, whether civil or criminal, in which the issue is raised.

Where the destination of the whole penalty is the state treasury, and where no particular form of action is specified, it is often very difficult to know what type of enforcement is contemplated by the legislators.[6] The intent may be to relieve the wrongdoer from the ignominy of a criminal prosecution. Any attempt to use the inherent character of the act as a test to determine how the statute was to be enforced overlooks the peculiarity of statutory law that the mode of punishment is not what a reasonable third person deems just, but exclusively what the legislators choose to make it.[7] Whether the punishment threatens the life or liberty of the offender has also been suggested as a criterion.[8] But the fact that so many offenses which entail punishments no severer than the pecuniary loss usual in civil suits are admittedly prosecuted as crimes seems to show the unsoundness of this test.[9] Also a provision for imprisonment in the statute is not decisive. Imprisonment on execution is wholly distinct in its nature from imprisonment on arrest, as is shown by the fact that the sovereign's pardon is of no avail in the former.[10] No general test seems possible.[11] Whether a statute gives

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[5] Bastardy proceedings: State *v.* Severson, 78 Ia. 653, 43 N. W. 533; State *v.* Nichols, 29 Minn. 357, 13 N. W. 153; Bell *v.* State, 124 Ala. 94, 27 So. 414; People *v.* Christman, 66 Ill. 162; Knowles *v.* Scribner, 57 Me. 495; Dukehart *v.* Caughman, 36 Neb. 412, 54 N. W. 680. *Contra*, Norwood *v.* State, 45 Md. 68; Van Tassel *v.* State, 59 Wis. 351, 18 N. W. 328; State *v.* Rogers, 119 N. C. 793, 26 S. E. 142. Private nuisance: State *v.* Collins, 68 N. H. 299, 44 Atl. 495. Fraud: Carter *v.* Gunnels, 67 Ill. 270; Sommer *v.* Oppenheim, 44 N. Y. Supp. 396, 19 Misc. Rep. 605. See *contra*, Bessey *v.* Minneapolis, St. P. & S. S. M. Ry. Co., 141 N. W. 244 (Wis.). Stolen money: Nebraska National Bank *v.* Johnson, 51 Neb. 546, 71 N. W. 294. Seduction: Nelson *v.* Pierce, 18 R. I. 539, 28 Atl. 806. Defamatory charge of crime: Ellis *v.* Buzzell, 60 Me. 209; Finley *v.* Widner, 112 Mich. 230, 70 N. W. 433. Arson: Blackburn *v.* St. Paul F. & M. Ins. Co., 116 N. C. 821, 21 S. E. 922; First National Bank *v.* Commercial Assurance Co., 33 Or. 43, 52 Pac. 1050.

[6] Att'y Gen. *v.* Bradlaugh, 14 Q. B. D. 667; Att'y Gen. *v.* Radloff, 10 Ex. 84.

[7] See SUTHERLAND, STATUTORY CONSTRUCTION, §§ 6 ff.

[8] Toledo, P. & W. Ry. Co. *v.* Foster, 43 Ill. 480; Palmer *v.* People, 109 Ill. App. 269.

[9] The earliest notions of criminal law were doubtless colored by the harshness of the old punishments, but this barbarity had vanished long before our modern constitutions and statutes favoring the accused. See 10 Am. Law Rev. 642.

[10] Quigley *v.* Aurora, 50 Ind. 28; Campion *v.* Gillan, 79 Neb. 364, 112 N. W. 585.

[11] It has further been suggested that in ambiguous cases the statute is criminal or not according to whether it prohibits; or merely states the penalty attaching to certain acts. *In re* Seagraves, 4 Okla. 422, 430, 48 Pac. 272, 274; see also SEDGWICK, CON-

rise to a civil cause or to a criminal cause must in the last analysis depend upon its particular wording and upon the customary mode of enforcement of similar statutes in the particular jurisdiction.

EQUITABLE CONVERSION AS RELATING TO OPTIONS. — In the ordinary case of an absolute contract to buy and sell land, Equity, looking to substance rather than to form, as it is said, regards the purchaser as owner and the vendor as having merely a claim for money with the legal title as security. If both the vendor and the purchaser die intestate immediately after the contract is made the vendor leaves, in substance, a claim for money which would devolve to his personal representatives and his heirs would hold the legal title in trust for them.[1] The purchaser's rights, being realty in substance, devolve to his heirs.[2]

Where, however, the contract is enforceable only on motion of the purchaser, as, for example, where an option is given, the vendor, if he dies before it is exercised, would seem to leave to his heirs both the legal and the equitable title. He has no claim for the purchase price, and so leaves none to his personal representatives. It would seem best that the rights of the heir and the personal representatives of the vendor should be settled once and for all at the vendor's death.[3] A subsequent exercise of the option, with its consequent actual conversion of the land of the deceased into money, should not divest the heirs.[4] Such a rule would be harmonious with other cases of equitable conversion where rights once vested remain fixed despite subsequent changes in form.[5] It is not contrary to any expressed intention of the testator. It is easy of application and does not change the feudal classification of property by giving realty to the personal representatives. A possible objection is, that it leaves out of account the probable intention of the deceased. His exact intention is unexpressed, but it would be proper for a court to lay down a rule to carry out the probable intent in the greatest number of cases.[6] Thus in the case of an absolute contract the deceased vendor has manifested an intention to convert realty into personalty, and so by a test based upon intention, also, the personal representatives would

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STRUCTION OF STATUTORY AND CONSTITUTIONAL LAW, 2 ed., 77. But the extreme infrequency of the latter type would seem to show that the legislators attached no decisive meaning to words of prohibition.

[1] Bubb's Case, Freem. 38.

[2] Milner *v.* Mills, Moseley 123; Moore *v.* Burrows, 34 Barb. (N. Y.) 173. These conversions have been thought by some authorities to be fictitious and unnecessary. See Lysaught *v.* Edward, 2 Ch. D. 499, 519; LANGDELL, in 18 HARV. L. REV. 246. But it is so well established that it must be accepted.

[3] Curre *v.* Bawyer, 5 Beav. 6; Keep *v.* Miller, 42 N. J. Eq. 100; Leiper's Appeal, 35 Pa. St. 420.

[4] Smith *v.* Lowenstein, 50 Oh. 346. See Rockland-Rockport Lime Co. *v.* Leary, 203 N. Y. 469, 478, 97 N. E. 43, 45. Graves *v.* Graves, 15 Ir. Ch. 357, and *Re* Walker's Estate, 17 Jur. 706, although purporting to be consistent with Lawes *v.* Bennett, 1 Cox Ch. 167, distinguish it in a very unsatisfactory way.

[5] Curteis *v.* Wormwald, 10 Ch. D. 172; Ackroyd *v.* Smithson, 1 Bro. Ch. 503.

[6] See Rockland-Rockport Lime Co. *v.* Leary, 203 N. Y. 469, 481, 97 N. E. 43, 46; Mayer *v.* Gowland, 2 Dick. 563, 565; Weeding *v.* Weeding, 1 Johns. & H. 424, 430; LANGDELL, in 18 HARV. L. REV. 246.